No. 91-6516

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD SOLDAL, *et al.*,
Petitioners,

v.

COUNTY OF COOK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici curiae will address the following questions:

1. Whether the County police officers acted reasonably within the meaning of the Fourth Amendment during the seizure of petitioners' mobile home.

2. Whether the County police officers violated petitioners' Fourteenth Amendment right to substantive due process.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The questions presented in this case will have a substantial impact on the scope of federal damages actions under 42 U.S.C. § 1983 for claims arising out of evictions and repossessions at which police officers are present. *Amici*

submit that even if the Fourth Amendment applies to private evictions and repossessions, respondents' actions were reasonable under the circumstances presented here.

Petitioners additionally seek to transform state law torts and procedural due process issues into substantive due process violations, thereby evading the strictures of *Parratt* v. *Taylor*, 451 U.S. 527 (1981). *Amici* believe that this case presents an important opportunity for the Court further to clarify the application of *Parratt* to random and unauthorized acts that can be remedied through adequate state postdeprivation procedures. Because this Court's decision will have a direct impact on matters of importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt respondents' statement of the case and also rely upon the factual findings of the district court and the court of appeals. *Amici* emphasize the following facts of importance to their arguments.

On September 4, 1987, the Cook County Sheriff's Police Department was contacted by the owner of Willoway Terrace, a mobile home trailer park. The park owners requested the presence of a police officer because they feared that a disturbance might occur while their employees moved a trailer. Captain Jackson assigned Lieutenant Jones and Deputy Sheriff O'Neill to "stand by and maintain the peace" during the move. District Ct. Mem. Op. at 2-3. Upon arrival at Lot 24 of Willoway Terrace, Officer O'Neill remained in his squad car while Willoway Terrace workers began preparations to move the trailer. Petitioner Edward Soldal came out of his trailer while the Willoway Terrace employees were preparing to move it and Soldal questioned them regarding their actions. After being told by the employees to ask the "sheriff deputy," Soldal approached Officer O'Neill and asked him, "What are you going to do about this?" Officer O'Neill responded that "he . . . was there to see that [I] didn't interfere with [Willoway's] workers." 923 F.2d at 1244.

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

At approximately the same time that the Willoway Terrace employees were preparing to move the trailer, Lieutenant Jones went to the Willoway Terrace office. At the office, Lieutenant Jones spoke with Margaret Hale, the manager of Willoway Terrace, who led Jones to believe that she had court approval for the eviction. Because she was unable to produce any court documentation, however, Lieutenant Jones called Captain Jackson and asked him to check the status of the lawsuit. Captain Jackson discovered that there was a case pending and that the parties were scheduled to appear in court on September 22, 1987. Lieutenant Jones then told Hale that without an eviction notice, the police could not intervene in this civil dispute. At this point, Willoway employees were already preparing to move the trailer off Lot 24. District Ct. Mem. Op. at 3.

When Soldal attempted to file a complaint for criminal trespass with Lieutenant Jones, Jones informed Soldal that Jones first needed to speak with a district attorney in order to determine whether Willoway's actions violated the law or whether the actions were a private matter between landlord and tenant. Assistant State's Attorney Dana Crowley advised Lieutenant Jones that in his opinion, the elements of criminal trespass were not present. As a result, Lieutenant Jones explained to Soldal that he could not take his complaint. *Id.* at 4.

Willoway Terrace employees moved the trailer off Lot 24. In the move, the skirting and canopy which attached the trailer to the lot were damaged. The sewer and water fixtures were also disengaged in order to move the trailer. Willoway Terrace management intended to

deposit the trailer on the shoulder of a local intersection. When Lieutenant Jones discovered this, however, he explained that it would not be permitted. As a result, the park owners made arrangements to store the trailer on private property next door. *Id.* Additionally, Lieutenant Jones made certain that the Soldal family had a place to stay. Arrangements were made for the Soldals to stay at a local motel for four nights at Willoway Terrace's expense. *Id.* at 5.

SUMMARY OF ARGUMENT

Petitioners seek to transform an eviction—a civil dispute governed by state law—into a federal constitutional case because police officers were present to maintain order while petitioners were evicted. Without invoking any state law remedies, petitioners filed a complaint under 42 U.S.C. § 1983, claiming that the respondent police officers violated petitioners' right to be free from unreasonable seizures under the Fourth Amendment and their right to substantive due process under the Fourteenth Amendment. As the court below recognized, neither theory is available to petitioners.

I.

The court of appeals correctly held that the Fourth Amendment does not apply to this case. The rationale for that holding is fully stated by both the lower court and Cook County. This brief assumes that there was a "seizure" of property within the meaning of the Fourth Amendment and presents the alternative argument that the judgment below should nonetheless be affirmed because the conduct of the police was reasonable within the meaning of the Fourth Amendment.

Section 1983 imposes liability for a Fourth Amendment seizure only if the seizure is unreasonable. While in many circumstances reasonableness requires the issuance of a warrant based upon probable cause, that standard is inapplicable when the police are present to keep the peace during evictions and self-help repossessions. In these contexts the courts should balance the "government's need for effective methods to deal with breaches of public order" against "the individual's legitimate expectations of privacy and personal security." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985). Such a balancing test gives proper weight to the public interest in keeping the peace during evictions and repossessions—common occurrences that are inherently likely to involve emotional confrontations that might otherwise result in violence. Because respondents' conduct in keeping the peace was reasonable, and did not permanently deprive petitioners of use of their property or involve any independent intrusion into their privacy, respondents should not be subject to liability under Section 1983 for any violation of petitioners' Fourth Amendment rights.

II.

The Due Process Clause does not impose liability for intentional deprivations of property as long as state law provides adequate postdeprivation procedures. Petitioners' failure to avail themselves of these remedies should result in dismissal of their substantive due process claim. The rule of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), would be significantly undermined if claimants were allowed to escape the effect of that rule merely by stating their claim in terms of "substantive," rather than procedural, due process. Indeed, under petitioners' logic, the destruction of property in *Hudson* v. *Palmer*, 468 U.S. 517 (1984), should be actionable, as a matter of substantive due process, regardless of available state remedies.

In addition, petitioners' allegations do not violate substantive due process as it has been defined by this Court. If minor damage to petitioners' mobile home during an

eviction is considered a constitutional violation that "shocks the conscience" or the deprivation of a "fundamental right," the protection of the Fourteenth Amendment will be improperly diluted. Every wrongful eviction and repossession necessarily results in some deprivation of property. Yet under petitioners' due process theory, any wrongful eviction or repossession in which police officers are present would give rise to a constitutional claim. Petitioners would have the Fourteenth Amendment become a "font of tort law," *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), a result flatly inconsistent with this Court's decisions.

ARGUMENT

I. RESPONDENTS' CONDUCT DURING THE SEIZURE WAS REASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The court of appeals held correctly that the removal of petitioners' mobile home was not a "seizure" under the Fourth Amendment. The *en banc* opinion of the Seventh Circuit and the brief of respondents fully address that issue and their reasoning need not be repeated here. Equally important, the police action in this case was reasonable. Thus, even if it is assumed that the removal of the trailer constituted a seizure under the Fourth Amendment, that seizure meets the standards of reasonableness embodied in the Fourth Amendment as it has been interpreted by this Court.

The Fourth Amendment declares that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures shall not be violated." As the language of the Amendment makes plain, "'[s]eizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.'" *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989).

Despite the practical importance of the question, the Court has not identified the specific standard of reasonableness which governs police protection of the peace during evictions and repossessions. It has recognized, however, that as a general matter "what is reasonable depends on the context within which a search [or seizure] takes place." *New Jersey* v. *T.L.O.*, 469 U.S. at 337. In many contexts reasonableness requires the issuance of a warrant based upon probable cause prior to a seizure. *See Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). In cases like this, however, where the warrant requirement is unworkable, the test for reasonableness balances the "government's need for effective methods to deal with breaches of public order" against "the individual's legitimate expectations of privacy and personal security." *T.L.O.*, 469 U.S. at 337.

This balancing test accords with the unusual circumstances of this case in which the facts do not fit easily into traditional Fourth Amendment categories. Private parties undertook the removal of the trailer. The Cook County sheriffs' deputies were present at Willoway Terrace for the purpose of protecting the peace and maintaining order in the midst of a potentially explosive landlord-tenant dispute. They were not conducting an investigation. The trailer was not seized as evidence of any crime, nor was it ever searched. Dist. Ct. Mem. Op. at 4-5. A private landlord-tenant dispute was assertedly transformed into a constitutional violation by the allegation of a conspiracy—assumed to be true by the court of appeals, *see* 742 F.2d at 1075—which led to a finding of state action. *Id.*[2] In other words, the Fourth Amendment

[2] Even if the Court were to hold that the Fourth Amendment applies here and that the police conduct was "unreasonable," there would remain the jurisdictional issue of whether there is "state action." Petitioners' conspiracy allegation obviously was intended to satisfy that requirement.

Amici do not concede that there was state action in this case. Indeed, for many of the reasons set forth in this brief, a special rule of "state action" may be required in private repossession or eviction cases in which the police are present to maintain the peace. Other-

claim arises only because of this attribution of a private removal to the police. Under these circumstances,-police conduct should be judged by a standard of what is reasonable conduct by officers keeping the peace in a civil dispute. Because the police conduct in keeping the peace, even as alleged by petitioners, meets the requirements of reasonableness under the Fourth Amendment, judgment was properly entered in favor of respondents on petitioners' Fourth Amendment claim.

A. The Fourth Amendment Reasonableness Standard Balances Government And Individual Interests.

At its passage, the Fourth Amendment was envisioned as a means of circumscribing the general search warrants which allowed extensive and continuous searches of citizens and their belongings. *T.L.O.*, 469 U.S. at 335 (citing *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977) and *Boyd* v. *United States*, 116 U.S. 616, 624-29 (1886)); *Brower*, 489 U.S. at 596 (citing *Boyd* v. *United States*, 116 U.S. 616, 624-25 (1886) and T. Cooley, Constitutional Limitations 301-02). Since then, the dominant focus of Fourth Amendment jurisprudence has been on such investigatory conduct by officials engaged in law enforcement.

The Court has not limited Fourth Amendment protection to the criminal context. "[I]t would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" *O'Connor* v. *Ortega*, 480 U.S. 709, 715 (1987) (citations omitted). But the Court has recognized that "[w]hat is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner*, 489 U.S. at 619 (citations omitted). Although the Fourth Amendment requires, "as a general matter, . . . a warrant issued upon probable cause, . . . neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees' Union* v. *Von Raab*, 489 U.S. 656, 665 (1989) (citations omitted).[3]

A different Fourth Amendment reasonableness standard is permitted when the warrant requirement is "unworkable," as it clearly is here. *See O'Connor*, 480 U.S. at 721-22. The Cook County sheriff's deputies arrived at the park in order to keep the peace during an eviction. They were not looking for evidence in a criminal matter. Faced with private parties engaged in a heated dispute, their objective was to prevent violence between the parties. Because the warrant requirement is inapplicable to this situation, the standard for judging respondents' conduct properly involves a balancing of the government and individual interests involved.

B. The Police Conduct Was Reasonable.

When respondents' "need for effective methods to deal with breaches of public order" is balanced against peti-

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wise, a mere conspiracy allegation will convert all such cases into triable constitutional tort claims. Courts of appeals have recognized that the state action issue in such eviction and repossession cases must be analyzed with particular concern not to sweep too broadly and thereby expose government to liability in what are essentially private disputes. *See, e.g., Howerton* v. *Gabica*, 708 F.2d 380 (9th Cir. 1983); *United States* v. *Coleman*, 628 F.2d 961 (6th Cir. 1980); *Menchaca* v. *Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980).

[3] In the administrative context, for example, the Court has acknowledged that the requirement of a warrant could interfere with, or event thwart, compliance with government regulations. *New York* v. *Burger*, 482 U.S. 691 (1987). In the public schools and in the workplace, the Court has held that school teachers and public employers would be hindered in their work if their disciplinary searches of students and employees' work areas required a warrant based on probable cause. *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985); *O'Connor* v. *Ortega*, 480 U.S. 709 (1987). In state probation proceedings, homes of probationers can be searched on less than probable cause. *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987).

tioners' "legitimate expectations of privacy and personal security," *T.L.O.*, 469 U.S. at 337, it is clear that the conduct of the police did not violate the Fourth Amendment. There is a strong public interest in keeping the peace in commonplace, potentially explosive situations such as evictions and repossessions. The State has established procedures to resolve landlord-tenant disputes and other creditor-debtor confrontations. When parties resort to self-help, the task of the police is not to adjudicate the underlying legal dispute but to prevent the eruption of violence, thereby protecting both the parties and uninvolved members of the public.[4]

It cannot be enough to create a triable issue under Section 1983 that the police were present and permitted to go forward the action that caused petitioners' home to be seized temporarily. If liability attaches in these circumstances, the police are presented with two unacceptable choices. Either the police must adjudicate the legal dispute on the spot, or they must refuse to remain present for purposes of maintaining order. The first choice is a usurpation of the judicial role, and the latter is unthinkable given the volatility of these kinds of disputes.

Thus, even when the facts are construed in a manner most favorable to petitioners, the police conduct throughout the events at the trailer park was reasonably designed to promote the peace, protect property, and not intrude

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[4] A leading authority has described as follows the role of line police officers:

> The patrolman's role is defined more by his responsibility for maintaining order than by his responsibility for enforcing the law. By "order" is meant behavior that either disturbs or threatens to disturb the public peace or that involves face-to-face conflict among two or more persons.

James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* 16 (1968), *quoted in* Thomas F. Adams, *Law Enforcement: An Introduction to the Police Role in the Criminal Justice System* 145 (1973).

into petitioners' privacy. After arriving at the scene of the dispute, the police acted to ascertain the respective positions of the parties and to keep the peace. The police never searched the trailer. The trailer did not remain in police custody. Instead, the police ensured that the trailer would be placed in a safe place. Dist. Ct. Mem. Op. at 4-5.

If the Court were to require more of the police in these circumstances, then many evictions or repossessions could give rise to allegations of constitutional violations under Section 1983. In every situation, police would have to adjudicate the legal merits of the parties' positions. The Fourth Amendment would be implicated in many everyday disputes. The civil remedies provided by the States would be undermined.

In this case the substantial public interest in the maintenance of the peace during a potentially explosive situation outweighs any legitimate expectations of security and privacy subject to Fourth Amendment protection that petitioners may assert. The government's role only marginally affected petitioners' interests in security because the park owner was going to remove the trailer in any event. The police acted to protect the trailer and to minimize the harm to the Soldals.[5] Dist. Ct. Mem. Op. at 4. Moreover, there is no allegation that the police entered petitioners' home or otherwise invaded their privacy.

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[5] The court of appeals was concerned that petitioners had been deprived of their state-created right to exercise limited force to protect their property. The presence of the police presumably deterred Soldal from taking matters into his own hands. But the state law shield for those who must act to protect their property (in the absence of police protection) should not be converted into a sword. State policy certainly does not encourage limited violence; it merely condones it. The dominant state policy remains to maintain the peace and the police properly served that interest.

Finally, there is no need for a Fourth Amendment remedy in this case. State law provides substantial rights and remedies for mobile home tenants such as petitioners, including remedies under tort law for trespass. *See, e.g., Ariola* v. *Nigro*, 156 N.E. 2d 536 (Ill. 1959). Petitioners' interests are also protected under the Illinois Forcible Entry and Detainer Act. Ill. Rev. Stat. ch. 110, para. 9-102 and 9-103 (1984). *See Buetner* v. *Krzystowczyk*, 93 N.E.2d 428, 429 (Ill. App. Ct. 1950) (tenants with actual possession of premises who were wrongfully evicted can maintain forcible entry and detainer action against landlord). Appropriate avenues thus existed for petitioners to pursue the claim which they incorrectly raise here under the Fourth Amendment.

In balancing government against individual interests in this setting of eviction by private parties, then, the balance of interests favors the government action. The police role was primarily a neutral one of keeping the peace; they acted reasonably to protect the "seized" property and they did nothing to invade petitioners' privacy. In sum, the police conduct, even if viewed as a "seizure," was reasonable within the meaning of the Fourth Amendment.

II. RESPONDENTS DID NOT VIOLATE PETITIONERS' RIGHT TO SUBSTANTIVE DUE PROCESS.

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), this Court held that when a State provides adequate postdeprivation process, property damage resulting from a random and unauthorized act does not present a procedural due process claim under 42 U.S.C. § 1983. *Parratt*, 451 U.S. at 544; *Hudson*, 468 U.S. at 533. Petitioners' case concerns only procedural due process issues, and as such, it should be dismissed for failure to invoke state remedies. Even if petitioners could apply substantive due process analysis to a property deprivation, however, petitioners' claim

fails to meet this Court's exacting substantive due process standards. In effect, petitioners attempt to constitutionalize a tort claim.

A. This Case Raises Only A Procedural Due Process Claim That Should Be Dismissed Under *Parratt* v. *Taylor* And *Hudson* v. *Palmer*.

Under *Parratt* v. *Taylor*, 451 U.S. 527 (1981), when a State provides adequate postdeprivation procedures, an individual suffering a loss of property due to a random and unauthorized act does not have a claim under Section 1983. *Id.* at 544. *Parratt* is premised on the principle that government cannot provide predeprivation process before its officers commit a random and unauthorized deprivation of procedural due process. See *id.* at 542-43. Thus, adequate state postdeprivation remedies are the only process the State could be expected to provide. *Id.* at 541. As long as these procedures exist, the Fourteenth Amendment is satisfied.

Three years later, in *Hudson* v. *Palmer*, this Court reaffirmed its holding in *Parratt* and expressly extended the rule in *Parratt* to intentional deprivations of property. 468 U.S. at 533. The Court emphasized that

> [t]he underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur.

Id.

Consistent with this reasoning, the court of appeals recognized that the analysis in *Parratt* retains equal validity when applied to petitioners' claim in this case. Accordingly, the court refused to permit petitioners to evade the requirements of *Parratt* v. *Taylor* merely by claiming that the damage to their trailer was a violation separate from the wrongful eviction. 923 F.2d at 1249. The

damage to petitioners' trailer cannot be analyzed separately from the wrongful eviction, and their claim for damages therefore cannot comprise a separate constitutional wrong; it is inseparable from the eviction and is subject to redress under state law.[6] Thus, petitioners have no procedural due process claim because meaningful postdeprivation remedies were available. *Parratt*, 451 U.S. at 539.[7]

Extension of petitioners' argument to its logical conclusion would impliedly overrule *Hudson*, which holds that even if property has been intentionally damaged, "in-

[6] As the court of appeals noted, 923 F.2d at 1248, under Illinois law petitioners could have sought damages in an action for trespass. *See, e.g., Ariola* v. *Nigro*, 156 N.E.2d 536 (Ill. 1959).

[7] Increasingly, plaintiffs seek to clothe procedural due process claims in the guise of substantive due process. *See, e.g., Midnight Sessions, Ltd.* v. *City of Philadelphia*, 945 F.2d 667, 682-83 (3d Cir. 1991) (plaintiff claimed that substantive due process was violated when plaintiff was arbitrarily denied a dance license), *cert. denied*, 112 S. Ct. 1668 (1992); *Santiago de Castro* v. *Morales Medina*, 943 F.2d 129, 130 (1st Cir. 1991) (plaintiff claimed that substantive due process was violated when plaintiff was fired notwithstanding her state-created property interest in her job); *Archuleta* v. *Colorado Dep't of Insts.*, 936 F.2d 483, 488-89 (10th Cir. 1991) (plaintiff claimed that substantive due process was violated when she was arbitrarily fired in deprivation of a state-created property right to continued employment); *Lum* v. *Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989) (plaintiff claimed that substantive due process was violated when he was arbitrarily discharged in violation of his state-created property right to continued employment), *cert. denied*, 493 U.S. 1057 (1990); *Spence* v. *Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (plaintiff claimed that substantive due process was violated when he was arbitrarily denied the state-created property right of an occupancy permit); *Weimer* v. *Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989) (plaintiff claimed that substantive due process was violated when plaintiff lost money as a result of the unauthorized action of a state official); *Kauth* v. *Hartford Ins. Co.*, 852 F.2d 951, 956 (7th Cir. 1988) (plaintiff claimed that substantive due process was violated when defendant sheriff seized plaintiff's property in violation of state law).

tentional deprivations do not violate [the Due Process Clause] provided, of course, that adequate state postdeprivation remedies are available." 468 U.S. at 533. The respondent in *Hudson* claimed both procedural and substantive due process violations. Brief for Respondent and Cross-Petitioner, *Hudson* v. *Palmer* at 3-4. Nonetheless, the Court in *Hudson* ruled that Hudson did not demonstrate a violation of the *procedural* requirements of the Due Process Clause. In a concurring opinion, Justice O'Connor elaborated upon the majority's due process analysis.

> The Constitution requires the government, if it deprives people of their property, to provide due process of law and to make just compensation for any takings. . . . Thus, in challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate.

468 U.S. at 539 (O'Connor, J., concurring). Petitioners' failure to challenge the adequacy of Illinois' postdeprivation remedies is thus fatal to their due process claim.

B. The Damage Alleged Did Not "Shock the Conscience," Nor Did It Deprive Petitioners Of A Fundamental Right.

The Due Process Clause of the Fourteenth Amendment not only guarantees fair procedure, it also contains a "substantive component . . . that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins* v. *City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992) (quoting *Daniels* v. *Williams*, 474 U.S. 327, 331 1986)). Because an allegation of lack of procedural due process would be satisfied by Illinois' adequate state remedies, petitioners attempt to bypass the state courts

and bring their due process claim under the auspices of substantive due process.[8]

Substantive due process requires the existence of a right "so rooted in the traditions and conscience of our

[8] This Court has left open the question of whether, in any circumstances, a deprivation of property can constitute a deprivation of substantive due process. *Regents of Univ.* v. *Ewing*, 474 U.S. 214, 222-23 (1985). The *Ewing* Court accepted the parties' invitation to assume that the interest in continued enrollment at a state university constituted a " 'constitutionally protectable property right.' " *id.* at 223 (quoting Tr. of Oral Arg. 3), and the Court held that "even if [the] assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action." *Id.*

Justice Powell, in concurrence, however, stated that he did not believe that a property interest derived from state law is entitled to substantive due process protection because "due process rights are created only by the Constitution." *Id.* at 229 (Powell, J., concurring). The fact that the state may have labeled the interest "property" did not entitle it "to join those other, far more important interests that have heretofore been accorded the protection of substantive due process." *Id.* at 230.

When confronted with substantive due process allegations, the lower courts have responded differently. *Compare Archuleta*, 936 F.2d at 489 (claim that arbitrary deprivation of government employment violated substantive due process fails when plaintiff received an adequate state postdeprivation hearing) *and Kauth*, 852 F.2d 951 (claim that wrongful attachment of property violated substantive due process fails because the deprivation of state-created property rights do not violate substantive due process unless state remedies are inadequate or there is the violation of some other substantive constitutional right) *with Midnight Sessions*, 945 F.2d at 683 (denial of a license to operate a dance hall violates substantive due process if the government actions were motivated by bias, bad faith, or improper motive) *and Spence*, 873 F.2d at 258 (denial of a building permit violates substantive due process if the property was deprived for an improper motive and the means were pretextual or arbitrary and capricious). *Cf. Lum* v. *Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989) (cataloging split in the circuits as to whether a state-created property interest in continued employment can constitute a substantive due process violation), *cert. denied*, 493 U.S. 1057 (1990).

people as to be ranked fundamental," *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Alternatively, a claimant can invoke substantive due process if the government action in question "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172 (1952), or is " 'used for purposes of oppression.' " *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). As Justice Stevens recently explained, however,

> the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive her . . . of that right.

Collins, 112 S. Ct. at 1068 (citing *Regents of Univ.* v. *Ewing*, 474 U.S. 214, 225-26 (1985)). Even if the facts alleged by petitioners are assumed to be true, petitioners are unable to demonstrate that the damage to and temporary deprivation of their trailer "shocks the conscience" or violates any fundamental right.

1. *The Damage To The Trailer Did Not "Shock The Conscience."*

Petitioners' exaggerated allegations of "wanton destruction" fail to meet this Court's exacting definition of "shocks the conscience." The phrase "shocks the conscience" requires egregious behavior on the part of the government, not mere error. Petitioners' claim fails this test. The conduct complained of does not approach the intentional invasion of bodily integrity found in

Rochin v. *California*, 342 U.S. 165 (1952). In *Rochin*, after deputies jumped upon the plaintiff and attempted to extract capsules from his mouth, they took him to a hospital and forced a tube into his stomach against his will. *Id.* at 166. The Court found these methods "too close to the rack and screw" and "bound to offend even hardened sensibilities." *Id.* at 172.

In this case, by contrast, the damage to petitioners' trailer and the temporary deprivation of its use, while unfortunate to be sure, do not approach conduct that "shocks the conscience". Even when the facts are read in the light most favorable to the petitioners, they fall far short of demonstrating that respondents engaged in "wanton destruction" (Pet. Br. 49) of the Soldals' trailer. On the contrary, it is undisputed that respondents ensured that the trailer would be safely stored on private property adjacent to Willoway Terrace rather than on the shoulder of a local intersection, as the park owners' management had planned. District Court Mem. Op. at 4. Moreover, respondents made sure that the Soldals would immediately be provided with accommodation at Willoway Terrace's expense. *Id.* at 5. In short, respondents' conduct during the eviction was not even arguably the sort of egregious government abuse of power that shocks the conscience and therefore violates a citizen's right to substantive due process.

2. *The Damage To The Trailer And Temporary Deprivation Of Its Use Did Not Deprive Petitioners Of A Fundamental Right.*

Even if it is assumed that the damage was intentional, there is no right "implicit in the concept of ordered liberty," *Palko*, 302 U.S. at 325, to be safe from intentional property damage, even damage done to a mobile home in a civil dispute. Petitioners can point to no authority to support their assertion to the contrary. As Justice Scalia stated in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality opinion):

> Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.'

Id. at 121 (quoting *Moore* v. *East Cleveland*, 431 U.S. 494, 502 (1977)). Nor should the fact "[t]hat the Court has ample precedent for the creation of new constitutional rights . . . lead it to repeat the process at will." *Id.* at 122 (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)). This Court would have to expand the heretofore narrow category of "fundamental rights" to an unprecedented extent in order to bring petitioners' claim within its scope.

Under petitioners' expansive theory of substantive due process, routine evictions and repossessions in which police officers are present to maintain the peace would give rise to fundamental rights governed by federal constitutional law. As this Court has stated, however, "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986). This Court has repeatedly rejected attempts to transform Section 1983 into a "font of tort law." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). This case requires the Court once again to refuse to withdraw matters of essentially local concern from the exclusive ambit of state law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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